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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 CANYON ESTATES CONDOMINIUM
9 ASSOCIATION, a Washington non-profit
corporation,

10 Plaintiff,

11 v.

12 ATAIN SPECIALTY INSURANCE
13 COMPANY; INDIAN HARBOR
14 INSURANCE COMPANY; WESTCHESTER
15 SURPLUS LINES INSURANCE
16 COMPANY; and GREAT LAKES
INSURANCE, SE,

17 Defendants.

CASE NO. C18-1761-RAJ

ORDER RE: PLAINTIFF'S MOTION
TO COMPEL WITH REGARD TO
GREAT LAKES INSURANCE, SE

18 Plaintiff Canyon Estates Condominium Association has moved to compel defendant Great
19 Lakes Insurance, SE to produce certain documents and to compel the deposition of defense counsel
20 Michael Hooks. (Dkt. 53.) Defendant opposes the motion. (Dkt. 71.) The matter has been
21 referred to the undersigned for decision by the Honorable Richard A. Jones. Having considered
22 the record and the documents submitted by the parties, the Court finds plaintiff's motion should
23 be GRANTED in part and DENIED in part.

1 This case arises from an insurance claim for long-term water damage filed with defendant
2 and other insurance companies. Notice of loss was sent to this defendant on April 6, 2018.
3 Defendant denied coverage by letter dated January 31, 2019, following which plaintiff sent an
4 Insurance Fair Conduct Act (IFCA) notice to defendant on March 7, 2019. Defendant reaffirmed
5 the denial of coverage on March 21, 2019, and plaintiff filed suit against this defendant (and other
6 insurance companies) on May 31, 2019. Claims include, *inter alia*, bad faith, a breach of the
7 Consumer Protection Act, and IFCA violations. (*See* Dkt. 19.)

8 The chronology of the claim is pertinent because plaintiff asserts defendant's trial counsel,
9 Michael Hooks, also performed claims-handling activities during the investigation and adjustment
10 of the claim prior to the filing of the lawsuit. Plaintiff cites *Cedell v. Farmers Ins. Co.*, 176 Wn.2d
11 686, 295 P.3d 239 (2013), as support for its assertion it is entitled to depose Mr. Hooks, and to
12 obtain unredacted copies of claim file documents and invoices for activities billed by Mr. Hooks
13 during the claims-handling period. Defendant asserts attorney-client privilege and the work
14 product doctrine and/or the mediation privilege in opposing the motion.

15 As both parties acknowledge, state law governs the assertion of attorney-client privilege.
16 Fed. R. Evid. 501. In *Cedell*, 295 P.3d at 246, the Washington Supreme Court found a presumption
17 "that there is no attorney-client privilege relevant between the insured and the insurer in the claims
18 adjusting process[.]" The attorney-client privilege is "generally not relevant." *Id.* Plaintiff argues
19 defendant cannot rebut this presumption, pointing to an inference Mr. Hooks participated in
20 preparing the denial of coverage letter as evidenced by Mr. Hooks' email and phone number at the
21 top of the document (Dkt. 54-3), and Mr. Hooks' admitted authorship of the March 21, 2019 IFCA
22 letter (Dkt 54-4). Plaintiff also notes the heavily-redacted Adjustor's Log (Dkt. 54-11 at 4-29),
23 which redactions are claimed by defendant based on attorney-client privilege, mediation privilege,

1 and work product. (Dkt 54-10 at 18.) Plaintiff argues the proliferation of these entries during the
2 claims-handling process shows the centrality of Mr. Hooks to the adjustment of the claim, and that
3 quasi-fiduciary activities are not protected by the attorney-client privilege or as attorney work
4 product.

5 Defendant does not dispute Mr. Hooks' participation in the drafting of the claim denial
6 letter or his authorship of the IFCA letter. However, it asserts Mr. Hooks was not involved in
7 investigating the claim, participating in site inspections, obtaining witness statements, retaining an
8 engineering expert, or making any settlement offers. Rather, defendant claims it decided to retain
9 legal counsel because the April 6, 2018 notification of loss letter came from plaintiff's attorney.
10 Defendant decided to have Mr. Hooks prepare the IFCA response because the notice to which it
11 was responding was prepared by an attorney and contained multiple legal citations. Defendant
12 asserts Mr. Hooks was retained only to provide "legal advice and counsel." (Dkt. 71 at 4.)

13 Defendant does not successfully rebut the discoverability presumption as to the information
14 sought by plaintiff, with certain exceptions noted below. Defendant's retention of Mr. Hooks and
15 his firm was nearly contemporaneous with receipt of the notice of the loss and the claims
16 adjustment process, long before litigation was commenced. By defendant's admission, Mr. Hooks
17 was involved in drafting the initial coverage denial letter and authored the IFCA letter that
18 reaffirmed the claim denial. This type of activity has been found to be among the quasi-fiduciary
19 tasks of investigating and evaluating or processing a claim. *See, e.g., Bagley v. Travelers Home*
20 *& Marine Ins. Co.*, No. C16-706-JCC, slip op. (Dkt. 32) at 7 (W.D. Wash. July 5, 2016).
21 Defendant's assertion it retained counsel simply because plaintiff's claim letter came from an
22 attorney does not logically support its claim the heavily redacted activities in the Adjustor's Log
23 should be exempt from discovery.

1 Defendant's claim of attorney work product protection also fails. Rule 26 protects
2 documents prepared "in anticipation of litigation or for trial[.]" Fed. R. Civ. P. 26(b)(3)(A). But
3 claims adjustment documents prepared as part of the insurance company's "routine duty to
4 investigate" are "created in the ordinary course of business and therefore [are] not protected by the
5 work product doctrine[.]" *Heath v. F/V Zolotoi*, 221 F.R.D. 545, 549-50 (W.D. Wash. 2004).
6 Defendant has not overcome the presumption the documents created prior to the issuance of the
7 IFCA response are discoverable.

8 With regard to those documents dated subsequent to March 21, 2019, however, defendant's
9 assertion of privilege and work product is more persuasive. Plaintiff apparently does not seek
10 production of documents covered by the mediation privilege (*see* Dkt. 73-4 at 4), and the
11 documents listed in the Amended Privilege/Redaction Log created near to the date of the May 21-
12 22, 2019 mediation can reasonably be identified as such. (Dkt. 74-1 at 12-17.) Likewise,
13 documents prepared after the March 21, 2019 IFCA response should be exempt from discovery as
14 likely privileged.

15 The Court, in sum, hereby finds and orders as follows:

16 (1) Plaintiff's Motion to Compel answers to Requests For Production 2, 11, 12, 13, 14
17 and 17 (Dkt 54-7 at 14, 19, 20, and 22) is GRANTED as to claim file documents listed in the
18 privilege log (Dkt 54-10) as entries 6-9, 12-16, and 24-69. Plaintiff's motion is DENIED as to
19 claim file documents identified in the privilege log as entries 71, 73, 79, and 84. With regard to
20 privilege log entry 117 (Dkt 54-10 at 18), plaintiff's motion for an unredacted copy of the adjustor
21 file (Dkt 54-11) is GRANTED for entries up to and including March 21, 2019, but DENIED as to
22 entries after that date. Documents should be produced no later than **fourteen (14) days** from the
23 date of this Order.

1 (2) Plaintiff also moves to compel production of “invoices received from the
2 Bracepoint Law firm which will permit consideration of the tasks performed by individuals at that
3 firm which qualify as ‘activities’ described in WAC 284-30-320(9).” (Dkt 54-7 at 19.) Plaintiff’s
4 motion is GRANTED as to invoices for services performed on or before March 21, 2019, which
5 consist of privilege log entries 5, 10, 11, and 18-21. Log entry 22 should be produced but may be
6 redacted as to services performed after March 21, 2019. Plaintiff’s motion is DENIED for entries
7 23, 70, and 72. Documents should be produced no later than **fourteen (14) days** from the date of
8 this Order.

9 (3) Plaintiff’s motion to compel the deposition of Michael Hooks is GRANTED. The
10 parties should meet and confer and agree on a date for the deposition.

11 (4) The Clerk is directed to send copies of this Order to the parties and to Judge Jones.

12 DATED this 20th day of November, 2019.

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15 Mary Alice Theiler
16 United States Magistrate Judge
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